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No. 00-860

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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BRIEF OF PETITIONER

GEORGE P. STASIUK
GEORGE P. BRENLLA
CLIFTON BUDD & DEMARIA, LLP
420 Lexington Avenue
New York, NY 10170
(212) 687-7410

KAREN M. MORINELLI
CORRECTIONAL SERVICES CORP.
1819 Main Street
Sarasota, FL 34236
(941) 953-9199

CARTER G. PHILLIPS *
FRANK R. VOLPE
JENNIFER M. RUBIN
REBECCA K. SMITH
SIDLEY AUSTIN BROWN & WOOD
1722 Eye Street, NW
Washington, DC 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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QUESTION PRESENTED

Whether a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be implied against a private entity acting under color of federal law.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, the Petitioner states that it formerly was known as Esmor Correctional Services, Inc. The other parties in the proceedings below were Jorge Urena* and "'John Does #2 to John Does #10,' Inclusive, The Names Of Said John Doe Defendants Are Presently Unknown But Intended To Indicate Managers And Guards Of The Corporate Defendant."

Pursuant to Supreme Court Rule 29.6, Petitioner states that there are no parent companies, subsidiaries, and/or affiliates of Correctional Services Corp. that have issued shares to the public.

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* In his amended complaint, Respondent substituted Jorge Urena for "John Doe Defendant #1." Although the caption to the district court's Memorandum Opinion and Order of July 28, 1999 (Pet. App. 19a) bears this substitution, the caption in the court of appeals opinion (*id.* at 1a) does not.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals was entered on October 6, 2000, is reported at 229 F.3d 374 (2d Cir. 2000), and was reprinted in the Appendix to the Petition for Certiorari (Pet. App. 1a-18a). The memorandum opinion and order of the United States District Court for the Southern District of New York was entered on July 28, 1999, is unreported, and is reprinted in Pet. App. 19a-24a.

JURISDICTION

The court of appeals entered its decision on October 6, 2000. The petition for a writ of certiorari was filed on November 22, 2000, and was granted on March 5, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case does not involve the construction of a particular statutory or constitutional provision. Instead, the issue presented is whether the Court should extend to private entities the constitutionally inferred cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT OF THE CASE

This case concerns a correctional institution operated by a private entity on behalf of the Federal Bureau of Prisons ("BOP"). The ultimate responsibility to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States" is committed to the BOP, "under the direction of the Attorney General," 18 U.S.C. § 4042(a)(2). Acting pursuant to statutory authority,[1]

[1] The statutory authority for this practice is found in scattered sections of the United States Code. *See, e.g.*, 18 U.S.C. § 3621(b) ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government *or otherwise*. . . .") (emphasis added); *id.* § 4002 (permitting the Attorney General to contract with States, territories, and their political subdivisions to house and care for federal prisoners); *id.* § 4013(b) (stating procedure for contracting with private entities to house and care for federal detainees); *id.* § 4247(i) (permitting the Attorney General to contract with States, their political subdivisions, localities, and private entities to house and care for federal offenders with mental diseases or defects); *id.* § 5040 (permitting the Attorney General to contract with private and public entities and individuals to house and care for juvenile offenders); 42 U.S.C. § 13901 (permitting the Attorney General to contract with public and private entities to house and care for certain inmates and their families in community correctional facilities); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, App. A, 113 Stat. 1501, 1501A-13 (1999) (authorizing and appropriating funds for the "Federal Prison System" to enter into contracts with private entities "for the confinement of Federal prisoners").

however, the BOP has entered into contracts with private entities, including Petitioner Correctional Services Corporation ("CSC"), for the housing, safekeeping, care, and subsistence of federal prisoners and detainees. Under a contract with BOP, and "on behalf of BOP," CSC operated Le Marquis Community Corrections Center, a halfway house located in New York. Pet. App. 2a.

Respondent John E. Malesko, having been convicted of federal securities fraud, was sentenced on December 3, 1992, to 18 months imprisonment under the supervision of the BOP. On February 2, 1994, Respondent was transferred by the BOP to Le Marquis for the remainder of his sentence.

According to Respondent's amended complaint, during his imprisonment he was diagnosed with a heart condition and was given a prescription for medication for that condition.[2] J.A. 10-11. CSC, "through its Officers, Directors, Guards, Servants and/or Employees" changed its elevator policy to prohibit inmates residing on the first through fifth floors of Le Marquis from using the elevator, but that CSC permitted him (a fifth-floor resident) to use the elevator because of his heart condition. *Id.* at 11. On March 28, 1994, however, a Le Marquis guard, Jorge Urena, allegedly required Respondent to use the stairs despite Respondent's protestation that he was specially permitted to use the elevator. *Id.* at 12. Respondent suffered a heart attack and fell while climbing the stairs to reach his fifth-floor room. Respondent argues that this injury was caused by the failure of unnamed persons to replenish his heart medication and by Officer Urena's denying him use of the elevator.

On March 27, 1997, Respondent filed a *pro se* complaint in the United States District Court for the Southern District of New York against CSC and ten "John Doe" defendants. On

[2] Because this appeal arises from an order dismissing the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), all allegations are accepted as true.

February 2, 1999, Respondent filed an amended complaint adding Officer Urena as a defendant. CSC moved to dismiss the amended complaint on February 10, 1999.[3]

The district court treated Respondent's amended complaint as raising *Bivens* claims. See Pet. App. 4a. On July 28, 1999, the district court granted CSC's motion to dismiss the amended complaint as to CSC "on two independent grounds: first, that Plaintiff cannot bring a *Bivens* action against a corporation; and, second, that CSC is immune to suit because it is a government contractor." *Id.* at 20a. Citing *FDIC* v. *Meyer*, 510 U.S. 471, 483-87 (1994), the district court reasoned that "[a] *Bivens* action may only be maintained against an individual," Pet. App. 20a, and thus, was not available against CSC, a corporation.

On appeal, the Second Circuit reversed the district court's dismissal of the claims against CSC. Agreeing with the Sixth Circuit's decision in *Hammons* v. *Norfolk Southern Corp.*, 156 F.3d 701 (6th Cir. 1998), and rejecting the D.C. Circuit's decision in *Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994), the court of appeals concluded that private entities such as CSC are amenable to suit under *Bivens*. See Pet. App. 8a-10a, 12a.[4] The Second Circuit adopted this expansion to the category of *Bivens* defendants

[3] On March 17, 1999, Respondent filed a motion for leave to file a second amended complaint to name additional CSC employees as "Doe" defendants. Pet. App. 20a. The district court denied this proposed amendment as untimely, and thus, futile under Rule 15 of the Federal Rules of Civil Procedure. *Id.* at 21a-24a. The district court also ruled that the claim against Officer Urena, the individual defendant named in the first amended complaint, was time-barred. *Id.* at 24a. The Second Circuit affirmed these rulings. *Id.* at 18a. As a result, CSC is the only defendant remaining in the case. Accordingly, this case does not present the question of whether private individuals who are employed by a private entity may be liable under *Bivens*.

[4] The Second Circuit also rejected the district court's holding regarding the government contractor defense. Pet. App. 13a. CSC did not seek review of that decision.

despite its recognition that such actions against private entities may lack "a substantial deterrent effect," *id.* at 10a, and that "a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government," thereby affecting the federal fisc, *id.* at 11a. On November 22, 2000, CSC filed a petition for *certiorari*, which this Court granted on March 5, 2001.

SUMMARY OF ARGUMENT

The court of appeals decision below is premised on three analytical flaws. First, the court ignored the holding in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), by extending the cause of action created in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to private entities "even absent a substantial deterrent effect," Pet. App. 10a. Second, the court failed to consider properly whether "special factors counsel[] hesitation," *Bivens*, 403 U.S. at 396, in creating a damages remedy against a new category of defendants where Congress has not acted. Third, the court of appeals improperly relied on 42 U.S.C. § 1983, to bolster its conclusion that extending the *Bivens* remedy is appropriate in this context. As shown below, an analysis free from these flaws compels the conclusion that extending *Bivens* liability to private entities is contrary to the logic of this Court's precedents embodied in *Bivens* and its progeny.

1. As this Court unanimously stated in *FDIC* v. *Meyer*, "the purpose of *Bivens* is to deter *the officer*." 510 U.S. at 485 (emphasis in original). Here, as in *Meyer*, extension of the *Bivens* remedy to entities will actually *undermine* the goal of deterring individual officers. *Id.* The court of appeals' contrary reasoning that expansion of *Bivens* in this context will still deter individual officers, see Pet. App. 11a, contradicts both common sense and this Court's express reasoning in *Meyer*, 510 U.S. at 485. As such, the decision below cannot stand, particularly in light of the fact that means exist by which a plaintiff in Respondent's position can sue for

compensatory damages or can seek to change an entity's policies.

2. As this Court emphasized in *Meyer*, extending the *Bivens* remedy "would be inappropriate *even if* such a remedy were consistent with *Bivens*" if special factors counsel hesitation. *Meyer*, 510 U.S. at 486 (emphasis supplied). Here, as in *Meyer*, extending liability to an entity serving the government interferes with federal fiscal decisionmaking. *Id.* at 486. In addition, the lower court's decision to extend *Bivens* liability to CSC, where the similarly situated BOP and FDIC are free from such liability, is illogical and inequitable and interferes with Congress's privatization policy. The policy issues raised by extension of *Bivens* in this context are ones that ought to be decided by Congress and, therefore, this Court should refuse to extend *Bivens* to private entities.

3. Unlike the appropriately narrow remedy created by this Court in *Bivens*, Section 1983 is a purposefully broad remedy created by Congress. Because Congress used its institutionally superior legislating powers to create its breadth, Section 1983 is irrelevant to the threshold question of whether courts should *create* a new *Bivens*-type remedy. Analogies to that statute, therefore, do not undermine the clear conclusion that judicially extending *Bivens* liability to private entities is inappropriate.

ARGUMENT

This Court's "recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended to new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). Indeed, in recent years, the Court has been presented with many requests to extend *Bivens* to new settings and to new classes of defendants, and has consistently declined these invitations. See *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Bush* v. *Lucas*, 462 U.S. 367

(1983); *Chappell* v. *Wallace*, 462 U.S. 296 (1983). In this case, Respondent asks the Court to expand dramatically the category of defendants susceptible to a *Bivens* action to include private entities acting under color of federal law. That expansion, however, is contrary to the *Bivens* line of cases, as we demonstrate in detail herein.

This Court has *never* authorized a *Bivens* action against any entity or, indeed, against any defendant other than an individual federal officer. In its most recent *Bivens* decision, the Court unanimously held that an entity, specifically the Federal Deposit Insurance Corporation ("FDIC"), is not subject to *Bivens* actions largely because "the purpose of *Bivens* is to deter *the officer*," and that purpose is not served, and in fact is undermined, by authorizing *Bivens* actions against an entity. *Meyer*, 510 U.S. at 485 (emphasis in original). Moreover, even where a *Bivens* remedy might serve a deterrent purpose or arguably would provide a more effective remedy, it will not be allowed where "special factors counsel[] hesitation in the absence of affirmative action by Congress." *Id.* at 486; *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

Accordingly, in assessing whether to allow a *Bivens* action against a private entity such as CSC, a court must first determine whether such an extension would serve the core *Bivens* purposes of deterring individual federal officers from violating the Constitution *and* providing a remedy where none otherwise exists. *Meyer*, 510 U.S. at 473, 484-85. Second, and independent from these questions, the court considers whether there are "'special factors'" that counsel against the proposed extension. *Id.* at 486 (quoting *Bivens*, 403 U.S. at 396); *Chappell*, 462 U.S. at 298 ("Before a *Bivens* remedy may be fashioned, . . . a court must take into account any 'special factors counselling hesitation.'"). Both components must be satisfied before extending *Bivens* to a new context,

and because neither is satisfied here, we respectfully submit that private entities should not be subject to *Bivens* actions.[5]

I. THE PURPOSES OF *BIVENS* ARE NOT ADVANCED, AND WOULD BE UNDERMINED, BY ALLOWING *BIVENS* ACTIONS AGAINST PRIVATE ENTITIES.

The cause of action for damages created by the Court in *Bivens* is a narrow judicial solution crafted to fill a particular gap: the lack of *any* damages remedy for specified constitutional violations committed by individual federal officers. See *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409-10 (1971) (Harlan, J., concurring).[6] In filling this gap, *Bivens* authorized damages

[5] The court of appeals and Respondent both rely on lower court cases decided prior to *Meyer*. *See* Resp. Pet. Opp. at 6 (citing cases); Pet. App. 6a, 12a. Most of these cases, however, did not squarely address whether *Bivens* could apply to private entities, but instead, focused exclusively on the private defendant's lack of federal action. *See, e.g.*, *Gerena* v. *Puerto Rico Legal Servs., Inc.*, 697 F.2d 447, 449 (1st Cir. 1983). To the extent these cases focused on the amenability question, they assumed without analysis that private individuals and entities were both subject to *Bivens* actions, *see, e.g.*, *Schowengerdt* v. *General Dynamics Corp.*, 823 F.2d 1328, 1337 (9th Cir. 1987), even though the arguments for individual and entity liability under *Bivens* are entirely distinct, *see Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223, 1226 (D.C. Cir. 1994). The pre-*Meyer* cases also failed to assess whether claims against private entities served the *Bivens* deterrent goal or to inquire whether special factors counseled hesitation. *See, e.g.*, *Yiammouyiannis* v. *Chemical Abstracts Serv.*, 521 F.2d 1392, 1393 (6th Cir. 1975). The pre-*Meyer* cases thus "do[] not survive *Meyer*." *Kauffman*, 28 F.3d at 1226.

[6] While the *Bivens* Court was responding in part to the then-narrow reach of the Federal Tort Claims Act ("FTCA"), the FTCA was "subsequently amended in light of *Bivens* to lift the bar against some . . . claims when arising from the act of federal law enforcement officers." *Butz* v. *Economou*, 438 U.S. 478, 504 n.31 (1978). In any event, in recent years, the Court has refused to extend *Bivens* even where the plaintiff lacks a fully effective alternative federal remedy. *See, e.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988) ("[T]he absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.").

suits against individual federal officers in order to serve a specific "purpose": "to deter *the officer*" by exposing him personally to the direct threat of litigation and liability if he uses his federal authority to act in an unconstitutional manner. *Meyer*, 510 U.S. at 485 (emphasis in the original) (citing *Carlson* v. *Green*, 446 U.S. 14, 21 (1980)). Accordingly, a *Bivens* action is appropriate only where it *both* provides damages for a constitutional violation that would otherwise lack *any* remedy *and* deters individual federal officers from committing constitutional violations. *Bivens* actions against private entities serve neither purpose and should not be allowed.

A. Extending *Bivens* To Private Entities Will Not Further, And Will Undermine, The Core *Bivens* Purpose Of Deterring Individual Officers.

Recently and unanimously, this Court made clear that the primary purpose of *Bivens* is to deter individual federal officers from committing constitutional violations. *Meyer*, 510 U.S. at 485. More specifically, the Court concluded that the fear of *Bivens* actions would dissuade individual federal officers from abusing their authority by subjecting them to a direct threat of litigation and liability for acting in a constitutionally proscribed manner.

When an individual federal officer is contemplating action, the threat of being personally sued under *Bivens* will affect his decisionmaking and deter him from engaging in unconstitutional acts. Indeed, "[i]t is almost axiomatic that the threat of damages has a deterrent effect . . . surely particularly so when the individual officer faces personal financial liability." *Carlson* v. *Green*, 446 U.S. 14, 21 (1980). Moreover, the pain of litigation—its many stresses,

embarrassments, and disruptions—is well known, and goes far beyond the threat of paying a lawyer or an adverse judgment. For example, this Court has recognized the intrusion of "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues," that often attends litigation. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982). Accordingly, the prospect of personally enduring litigation encourages individuals acting under a cloak of federal authority to conduct themselves in a constitutionally appropriate manner.

This Court has made clear that an individual is deterred by the threat of litigation and liability even where he or she may have qualified immunity, is indemnified by the employing agency or entity, or is acting pursuant to an entity's policy. See, *e.g.*, *Meyer*, 510 U.S. at 473 (observing that the individual employee had qualified immunity);[7] *id.* at 474 (observing that the employee who terminated plaintiff was acting pursuant to an FDIC policy); *id.* at 486 (acknowledging the possibility of indemnification of officers for *Bivens* liability).[8] None of these circumstances, the Court has

[7] A CSC employee, unlike an FDIC employee, may not be entitled to qualified immunity, but may be entitled to raise a good faith defense. *See Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997) (holding that qualified immunity is not available to private prison guards under 42 U.S.C. § 1983, although a good faith defense may be available); *see also* n.19, *infra* (discussing *Richardson*). Even so, if an individual federal officer *entitled* to qualified immunity protections is effectively deterred by the possibility of a *Bivens* action, as was the individual officer in *Meyer*, then a CSC guard working at a facility under a contract with the BOP who is *unsure* whether he is entitled to qualified immunity will be even more effectively deterred.

[8] In fact, the FDIC (and its statutory predecessor, the FSLIC), the federal entity at issue in *Meyer*, has had a policy of indemnifying its employees for constitutional torts since at least 1984. *See* 137 Cong. Rec. H1735-01, 1748 (daily ed. Mar. 13, 1991), *available at* 1991 WL 43750 (FDIC Statement of Policy and Plan for the Indemnification of Directors, Officers and Employees) (including indemnification for "all constitutional torts"). More generally, many federal entities have policies permitting the

determined, gives rise to individual indifference to the prospect of entanglement in litigation and potential liability.

Equally to the point, the Court has concluded that an individual will *not* be effectively deterred by the prospect that his or her employer may be subject to suit. This is the necessary premise of *Meyer* where the Court held that "the deterrent effects of the *Bivens* remedy would be lost" if the Court were to imply a damages remedy directly against the entity that employs the offending individual. 510 U.S. at 485. As the Court explained, "[i]f we were to imply a damages action directly against federal agencies . . . there would be no reason for aggrieved parties to bring damages actions against individual officers. . . . [T]he deterrent effects of the *Bivens* remedy would be lost." *Id.* This logic applies with equal force to Respondent's proposed *Bivens* action against a private entity:

> [O]n *Meyer*'s logic, provision of a damages remedy against a private entity would actively diminish the deterrent value of the remedy against the individual . . . . If such additional defendants were available (often with deeper pockets than the individual offenders), plaintiffs might make the same choice as the [plaintiffs here], who

indemnification of their employees for "any" suit in federal or state court arising from conduct falling within the scope of employment. *See*, *e.g.*, 13 C.F.R. § 114.110 (Small Business Administration); 14 C.F.R. § 1261.316 (National Aeronautics and Space Administration); 15 C.F.R. § 15.31 (Department of Commerce); 17 C.F.R. § 142.2 (Commodity Futures Trading Commission); 22 C.F.R. § 21.1 (Department of State); 22 C.F.R. § 207.01 (Agency for International Development); 24 C.F.R. § 18.1 (Department of Housing and Urban Development); 28 C.F.R. § 50.15(c) (Department of Justice); 34 C.F.R. § 60.1 (Department of Education); 43 C.F.R. § 22.6 (Department of the Interior); 45 C.F.R. § 36.1 (Department of Health and Human Services). Moreover, federal employees sued in their individual capacities for actions that reasonably appear to have been performed in the scope of their employment may be provided with representation by the Department of Justice. 28 C.F.R. § 50.15(a).

brought their *Bivens* actions only against the private entity and not against the individual board members.

Kauffman v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1227 (D.C. Cir. 1994); see also *AccuBanc Mortgage Corp.* v. *Drummonds*, 938 S.W.2d 135, 144-45 (Tex. Ct. App. 1996) (same).

Moreover, even if plaintiffs still sued individuals as well as entities, "they would likely focus collection efforts against the entity, with effects only partly blunted by the entity's rights to contribution" from the wrongdoing employee. *Kauffman*, 28 F.3d at 1227. Thus, like the proposed expansion of *Bivens* liability to the FDIC, the expansion of *Bivens* liability to private entities such as CSC would undermine the deterrence rationale of *Bivens*. And the Second Circuit's contrary assumption—that employers are better targets for *Bivens* liability than are employees, Pet. App. at 11a—has been specifically rejected by this Court, see *Meyer*, 510 U.S. at 484-86; *Carlson*, 446 U.S. at 21. See also *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981) ("[A] damages remedy recoverable against individuals is *more effective* as a deterrent than the threat of damages against a government employer.") (citing *Carlson*) (emphasis supplied).[9]

Given that the purpose of *Bivens* is "to deter *the officer*," the proper "claim that the logic of *Bivens* supports" is a claim against the individual federal officer who allegedly violated the plaintiff's rights, not against the entity employing the wrongdoing individual. *Meyer*, 510 U.S. at 485; see also *id.* at 484 (observing that, in *Bivens*, the appropriate defendants

[9] Nevertheless, both the Second and Sixth Circuits were willing to disregard the Court's teaching about deterrence and extend a *Bivens*-type action against private entities "even absent a substantial deterrent effect," Pet. App. at 10a, and "regardless of whether future lawless conduct is deterred." *Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 706 (6th Cir. 1998). This approach cannot be reconciled with the Court's *Bivens* jurisprudence and should be rejected.

were "the *agents* of the Federal Bureau of Narcotics who allegedly violated [plaintiff's] rights, not the Bureau itself") (emphasis added). *A fortiori*, the proper *Bivens* defendant is not an entity, be it private or public.[10]

B. Plaintiffs In Respondent's Shoes Have No Need For A *Bivens* Remedy Against Entities.

Unlike the plaintiff in *Bivens* who would have lacked any damages remedy for the alleged constitutional violations but for this Court's authorization of a cause of action against the FBI officers, 403 U.S. at 409-10 (Harlan, J., concurring),[11] Respondent had several substantial remedial options.

Respondent assumes—and the court of appeals appears to have agreed—that he could have brought a *Bivens*-type action against CSC's individual employees who allegedly acted unconstitutionally under color of federal law. See J.A. 9 (naming various individual CSC employees, including numerous "John Does" and Officer Urena as *Bivens* defendants).[12] While the Court has never decided whether individual employees of private entities acting under color of federal law are subject to *Bivens* actions, the weight of authority is that they are. See generally *Heinrich ex rel. Heinrich* v. *Sweet*, 62 F. Supp. 2d 282, 306-07 (D. Mass.

[10] While the *Bivens* vehicle only addresses wrongdoing by individuals, as shown in Section I.B., *infra*, a plaintiff has a variety of potential alternative means to recover damages from individuals or entities or to enjoin an entity's allegedly unconstitutional policies.

[11] Indeed, Respondent's numerous options stand in marked contrast to those available to the plaintiffs in *Bivens* and *Davis* v. *Passman*, 442 U.S. 228 (1979). Because the alleged wrongdoer in *Davis* was a United States Congressman, the *Davis* plaintiff had "no other alternative forms of judicial relief," *id.* at 245, "'no cause of action under [state] law,'" *id.* at 245 n.23, and no Title VII action "available," *id.* at 247 n.26. Indeed, the only available "remedy" for the plaintiff in *Davis* was a "voluntary" committee process with "no enforcement powers." *Id.* at 243 n.21.

[12] As discussed above, *see* n.4, *supra*, Respondent's attempt to name individual employees as defendants was time-barred.

1999) (collecting cases). And while future defendants should be permitted to argue that extending *Bivens* to these individuals is not warranted, the availability of such a claim has been assumed from the inception of this case. That being so, it is not logical for Respondent to argue that a *Bivens* action against the private entity should be inferred. As this Court explained, in the face of individual liability, institutional liability does not comport with the "logic" of *Bivens*:

> An additional problem with Meyer's "logic" argument is the fact that we implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available. In essence, Meyer asks us to imply a damages action based on a decision that presumed the *absence* of that very action.

Meyer, 510 U.S. at 485 (emphasis supplied).

In addition to recourse against the appropriate *Bivens* defendant, *i.e.*, the individual wrongdoing officer, plaintiffs in Respondent's position may have other judicially enforceable mechanisms for recovering compensation from wrongdoing officers and from entities. For example, plaintiffs in Respondent's position may have remedies under federal statutes. Here, for example, Respondent has asserted that he is entitled to recover under the Americans With Disabilities Act, 42 U.S.C. § 12131, *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. See Pet. App. 18a n.5 (noting that Respondent briefly raised these issues for the first time in his brief to the Second Circuit). The lower court did not address these claims.[13] Such congressionally created remedies could

[13] The Second Circuit declined to address the merits of Respondent's claims and permitted the district court to "consider the arguments on remand after the issue has been adequately briefed." Pet. App. 18 n.5. It would appear, however, that Respondent has waived these arguments by not pursuing them before the district court.

provide means both of compensating a plaintiff for injuries and of compelling an entity to change its policies.

Additionally, as Respondent also acknowledges, plaintiffs in his position have a remedy under state law. See Resp. Pet. Opp. 13 ("In every state, individuals may sue corporations for the torts they commit. In many states, including New York, private employers are liable for many of their employees' torts."). Respondent thus could have filed a tort claim against CSC or its employees.[14] There is nothing that remotely suggests that such a tort law remedy would have been inadequate to redress his claims.

Indeed, given the heightened "*deliberate* indifference to serious medical needs" standard of the Eighth Amendment,[15] *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (emphasis supplied), it likely would be *easier* for someone in Respondent's position to prevail under a state tort claim than under a constitutional tort theory. See *Daniels* v. *Williams*, 474 U.S. 327, 330, 331 (1986) (stating that while both the Due Process Clause and the Eighth Amendment require "deliberate" violations by officers, "merely negligent conduct" involving lack of due care by prison officials is suitable for state tort relief) (citing *Estelle*); *id.* at 332 ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant

[14] Although Count I of Respondent's Amended Complaint arguably alleged a negligence claim, *see* J.A. 11-13, Respondent never sought any relief on any ground other than *Bivens*. Moreover, both the district court and the Second Circuit treated this case as raising only *Bivens* claims. *See* Pet. App. 4a, 20a-21a. Accordingly, any tort claim respondent may have had was abandoned long ago and is therefore forfeited.

[15] While neither court below reached the question of which constitutional provision Respondent's putative *Bivens* claim arose under (and Respondent did not so specify in his amended complaint), it appears that Respondent attempted to raise a claim of "deliberate indifference . . . to a prisoner's serious illness or injury" under the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. 97, 104-05 (1976).

traditional tort law."); see also *Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992) (noting that, even when malevolent touching is alleged, "'[n]ot every push or shove [by an officer], even if it may later seem unnecessary . . . , violates a prisoner's constitutional rights'") (quoting *Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). In *Bivens*, by contrast, in the search and seizure context, state law remedies were feared to offer a narrower remedy to an aggrieved plaintiff than would the Fourth Amendment in the circumstances presented. 403 U.S. at 393-94. Here, there is no indication that Respondent was precluded from bringing a state law claim against CSC or its employees or that such a tort claim would be insufficient to provide compensation for any injury.

Accordingly, Respondent's situation stands in sharp contrast to cases where this Court has applied the *Bivens* remedy. Cf. *id.* at 409-10 (Harlan, J., concurring) ("For people in Bivens' shoes it is damages [against the individual officer] or nothing."); *Davis* v. *Passman*, 442 U.S. 228, 243 n.21, 245 (1979) ("For Davis, as for Bivens, it is damages or nothing"; no remedy other than an unenforceable "voluntary" committee process). Malesko—unlike Bivens—is not a plaintiff in search of a remedy. Plaintiffs in "Malesko's shoes" may obtain redress for harms suffered without the unprecedented and substantial extension of *Bivens* sought by Respondent.

Moreover, in addition to these remedies, people in Respondent's position also may have administrative and injunctive vehicles through which to address their complaints against both individual officers and entities. First, administrative remedies may be available to address an individual officer's conduct or an entity's policies. For example, the BOP's Administrative Remedy Program ("Program"), provides "a process through which inmates may seek formal review of an issue which relates to *any aspect* of

their confinement." 28 C.F.R. § 542.10 (emphasis added).[16] Second, a plaintiff seeking to challenge an entity's policy as being unconstitutional may seek injunctive relief pursuant to 28 U.S.C. § 1331, to change that policy. Unlike the *Bivens* remedy, which has never been the proper vehicle through which to alter an entity's policy, see Section I.A., injunctive relief has long been recognized as a proper means through which to prevent an entity from acting unconstitutionally. Injunctive relief, unlike the *Bivens* remedy, is well-tailored to

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[16] The Program applies to all "inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons' responsibility." 28 C.F.R. § 542.10; *see also* Pet. App. 2a (describing Le Marquis, the halfway house to which Respondent was assigned by BOP, as a "Community Corrections Center"). Moreover, "[i]nmates in CCCs are not required to attempt informal resolution" before utilizing the Program. 28 C.F.R. § 542.13. The Community Corrections Manager, Warden, Regional Director, and General Counsel are charged with "implementation and operation" of the Program at CCCs and "shall": "[e]stablish procedures for receiving, recording, reviewing, investigating, and responding" to inmate requests and appeals; "[a]cknowledge" receipt of an inmate's request or appeal; "[c]onduct an investigation" into each request or appeal; and "[r]espond" to all requests and appeals. *Id.* § 542.11. In the case of "*[s]ensitive issues*," an aggrieved inmate may submit a request directly to a regional director outside of the institution in which the inmate is housed. *Id.* § 542.14(d). In addition, appeals, *id.* § 542.15, and assistance, *id.* § 542.16, are available.

The Program provides an additional means through which allegedly unconstitutional actions and policies can be brought to the attention of both CCC management and the BOP and be prevented in the future. *See Farmer* v. *Brennan*, 511 U.S. 825, 847 (1994) ("[A]n inmate would be well advised to take advantage of internal prison procedures for resolving inmate grievances."). Although claims that are covered by other administrative procedures (such as tort claims under the FTCA), 28 C.F.R. § 542.12(b), are excluded from the Program, constitutional claims recognized under *Bivens* are included. *See* 42 U.S.C. § 1997e(a) (1996) (creating mandatory requirement that prisoners exhaust administrative remedies), *superseding McCarthy* v. *Madigan*, 503 U.S. 140, 142 n.2, 152 (1992) (holding that a prisoner need not exhaust administrative remedies under the Program before bringing a *Bivens* claim against individual federal officers where "Congress has not *required* exhaustion").

the goal of preventing entities from engaging in unconstitutional behavior. Finally, in addition to these alternatives, the BOP has several means to check the behavior of a private correctional provider including vigorous oversight and refusing to extend the contract with a wrongdoing corporation.

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Like the plaintiff in *Meyer*, Respondent seeks a dramatic extension of *Bivens* but that extension would not advance—and would indeed undermine—the core *Bivens* purpose of deterring individual officers from engaging in unconstitutional wrongdoing. Nor is the proposed extension necessary to remedy constitutional violations against those in Respondent's position. For these reasons alone, this Court should reverse the Second Circuit's impermissible expansion of the category of *Bivens* defendants to include private entities.

II. SPECIAL FACTORS COUNSEL AGAINST EXTENDING *BIVENS* TO PRIVATE ENTITIES.

Even if extending *Bivens* liability to private entities in this context would further the deterrence and compensation goals of *Bivens*—which it would not—extension is nonetheless inappropriate because special factors counsel against it. See *FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994) (holding unanimously that, where special factors are present, a *Bivens* remedy is "inappropriate even if such a remedy is consistent with *Bivens*"). Special factors present in this case make it plain that extending *Bivens* in this context would be unwise and inappropriate.

In determining whether there are "special factors" in a given case, "the range of policy considerations [the Court] may take into account is at least as broad as the range of those a legislature would consider." *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring). Thus, the "*Bivens* line[] of cases reflects a sensitivity to varying contexts. . . . The range of

concerns to be considered in answering this inquiry is broad." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 280 (1997) (Kennedy, J., opinion) (citation omitted) (comparing the case-by-case analyses required under *Bivens* and *Ex parte Young*, 209 U.S. 123 (1908)). Of particular import in this inquiry is "whether the courts are qualified to handle the types of questions raised by the plaintiff's claim." *Butz* v. *Economou*, 438 U.S. 478, 503 (1978). Sensitive to the varying institutional abilities of different branches of the Federal Government, see *Bush* v. *Lucas*, 462 U.S. 367, 389 (1987), this Court has been reluctant to resolve questions that lie within the institutional competence of Congress or to interfere with determinations that Congress already has made. See, *e.g.*, *id.*, at 380 (stating that the prudential "special factors" speak not to "the merits" of the proposed remedy but rather "to the question of who should decide whether such a remedy should be provided").

In conducting the "special factors" analysis, the Court first considers "how harmful and inappropriate judicial intrusion upon [the subject matter] is thought to be. This is essentially a policy judgment, and there is no scientific or analytic demonstration of the right answer." *United States* v. *Stanley*, 483 U.S. 669, 681 (1987). Second, the Court makes an "analytic" judgment about "the degree of disruption [a *Bivens* action] will in fact produce" if extended to a given context. *Id.* In making these assessments, "it is irrelevant . . . whether the laws currently on the books afford [a potential plaintiff] an 'adequate' federal remedy for his injuries." *Id.* at 683.

Under these principles, several "special factors" counsel against authorizing *Bivens* actions against private entities, and specifically private correctional providers. To prevent interference with federal fiscal decisionmaking, to maintain equitable treatment of public and private entities acting under color of federal law, and to avoid interference with Congress's interest in privatization, this Court should reject the proposed expansion of *Bivens* liability to private entities

and leave such extension to Congress's informed judgment. Whether considered separately or "[t]aken together," *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983), these special factors demonstrate that an extension of *Bivens* is inappropriate in this context.

A. Extending *Bivens* Liability To Private Governmental Contractors Threatens Federal Fiscal Policy And The Federal Fisc.

This Court has previously recognized that a primary factor weighing against judicial expansion of *Bivens* is the extent to which that expansion would interfere with or have a detrimental impact on "federal fiscal policy." *Meyer*, 510 U.S. at 486; *Bivens*, 403 U.S. at 396. Pertinent here, this Court has refused to extend *Bivens* liability where such an extension could require the expenditure of federal funds or otherwise significantly affect federal fiscal decisionmaking. *Meyer*, 510 U.S. at 486. In *Meyer*, for example, the Court held that because permitting a direct action against a government corporation could "creat[e] a potentially enormous financial burden for the Federal Government," imposition of liability against such defendants was "inappropriate even if such a remedy were consistent with *Bivens*." *Id.*

This limiting principle also applies to Respondent's attempts to extend *Bivens* liability to private entities, such as CSC, that contract with and act on behalf of the Federal Government. This Court has recognized that "[t]he financial burden of judgments against the [government] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since . . . contractors will predictably raise their prices to cover, or to insure against, contingent liability." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) (creating the government contractor defense). The analysis in *Boyle* accords well with common sense and with economic realities. As Respondent acknowledges, CSC (like other private government contractors) is a

profit-making entity. See Resp. Pet. Opp. at 1, 5, 7, 13. *Boyle* reflects the fact that profit-making entities will seek to avoid absorbing costs by passing on those costs to end users (here, the Federal Government)—particularly where, as here, all other competitors will be likewise subject to the same risk of liability. This is singularly likely for industries, such as prison management, where the government is the only purchaser of the services in question.

Indeed, the Second Circuit acknowledged that "a private entity contracting to carry out governmental functions might pass on the costs of *Bivens* liability to the government." Pet. App. 11a. While the Second Circuit glossed over this threat to the federal fisc on the ground that it was not sufficiently "direct," *id.*, *Boyle* is unquestionably correct in stating that an *indirect* attack on the fisc is a threat nonetheless. Indeed, while assessing liability against a government contractor may not "directly" remove money from the Treasury, it will lead to either the unavailability of government contractors or higher prices for the Government: "Either way, the interests of the United States will be *directly* affected." *Boyle*, 487 U.S. at 507 (emphasis supplied).[17]

Respondent has erroneously suggested that federal monies will not be at risk if *Bivens* liability is extended to private entities because insurance policies will cover the liability. See Resp. Pet. Opp. at 11. As this Court in *Boyle* recognized, however, private contractors will pass on to the government *either* the increased contingent liability *or* the increased cost

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[17] In addressing this question the D.C. Circuit correctly recognized that extending *Bivens* liability to private entities would constitute a threat to the federal fisc because "diversion of resources from a private entity created to advance federal interests has effects similar to those of diversion of resources directly from the Treasury." *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1227-28 (D.C. Cir. 1994). This is because the diversion of resources will require the Federal Government to make a choice between either providing more funds to the entity or risking that its interests will suffer due to inadequate funding. *Id.*

of insuring against that liability. 487 U.S. at 511-12. Because extending *Bivens* liability to private entities will increase the risk of loss, it follows inevitably that a private entity subject to *Bivens* liability would be required by an insurance company to pay higher premiums to cover that higher risk.[18] Additionally, to the extent that liability exceeds the amount covered by such an entity's insurance policy, that liability would be passed along to the Federal Government.

If *Bivens* were extended to private entities acting on behalf of the Federal Government, there is little that those entities could do to eliminate their exposure to liability, and thus, to avoid passing along their increased costs to the Federal Government. For example, in the instant context, the nature of prison management would make *Bivens* lawsuits unavoidable, and imposing *Bivens* liability in this new context would inevitably lead to higher costs to the Federal Government. Indeed, it is no answer to assert that all a private correctional provider need do to avoid *Bivens* liability is to act in a constitutionally consistent manner. "The administration of a prison is a difficult undertaking at best, for it concerns persons many of whom have demonstrated a proclivity for antisocial, criminal, and violent behavior." *Cleavinger* v. *Saxner*, 474 U.S. 193, 203 (1985); cf. *Shaw* v. *Murphy*, __ U.S. __, No. 99-1613, 2001 WL 387410, at **4 (Apr. 18,

[18] Risk is "the basis of the computation of a premium that an insured pays to the insurer to acquire insurance." Keeton & Widiss, *Insurance Law* § 1.3(a) n.1 (1988). "[I]f two purchasers of insurance coverage have different predicted losses or actual loss experiences, it is easy to conclude that the prices that each pay should reflect those differences." Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 Va. L. Rev. 403, 404 (1985). Indeed, if an entire group of insureds is subject to a given risk, an insurance company may choose to classify it as a single group for premium pricing purposes, in order to spread the risk among that group. *Id.* Thus, if the entire group of private correctional providers is subject to *Bivens* liability, a particular provider which takes extra steps to avoid *Bivens* liability may still be subject to higher insurance premiums. Accordingly, all contractors would pass along the increased costs to the Federal Government, thereby impacting federal fiscal policy.

2001) (discussing deference given to prison officials' policies).[19] Even worse, "[t]he number of nonmeritorious prisoners' cases" filed, *Cleavinger*, 474 U.S. at 203, will only be exacerbated by the availability of a "deep pocket" corporation as an attractive litigation target, *Kauffman* v. *Anglo-American School of Sofia*, 28 F.3d 1223, 1227 (D.C. Cir. 1994).

If subjected to *Bivens* liability, any private correctional provider—even one acting in good faith—would be targeted for numerous, often nonmeritorious lawsuits and would pass the resulting costs of litigation and liability on to the Federal Government. This Court should "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Meyer*, 510 U.S. at 486.

B. Extending Liability To Private Entities Is Illogical And Inequitable And Would Undermine Congressional Privatization Policy.

Because of recent congressional policy permitting privatization of certain governmental functions, a new breed of government contractor has arisen: entities that do not

[19] This discretion inherently increases the risk of lawsuits, particularly given that, as the very existence of the qualified immunity defense acknowledges, there are situations in which a government actor may seek to act constitutionally but fail because the constitutional right is not one that is "clearly established." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-18 (1982). While the Court has not addressed this question in terms of private prison guards under *Bivens*, the Court has held that qualified immunity is not available to private prison guards under Section 1983. *See Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997). *Richardson* based its conclusion largely on a historical analysis, but also concluded that the likelihood that private correctional facilities have insurance covering the guards' actions reduces the risks that a prison guard might not do an effective job or eschew such employment absent qualified immunity. *Id.* at 410-11. This analysis did not consider the risk that the increased liability may raise insurance premiums or necessitate the purchase of additional insurance, because it was assessing the effect of both insurance and liability on private prison guards, not on the corporations who actually pay for insurance. These considerations are highly relevant here.

merely *assist* an agency with an aspect of its mission, but instead, actually *perform* the mission. A plaintiff may not logically assert that a private entity performing such a governmental mission should be subject to *Bivens* because it is analogous to a federal entity and yet maintain that the private entity, unlike its federal counterpart, may incur *Bivens* liability. See *Kauffman*, 28 F.3d at 1226 (It is "untenable to draw this analogy [between a federal agency and a private entity] for purposes of *Bivens* but not for purposes of *Meyer*."). *Kauffman*'s logic accords well with common sense, but also with the principle of equity: Similarly situated entities should receive identical treatment under the law.

In this case, CSC is being sued because it is performing the BOP mission. As such, it effectively stands in the shoes of the BOP and, like the BOP, should not be amenable to *Bivens* suits. Moreover, CSC also shares a remarkably similar legal nature to the FDIC, the entity held in *Meyer* not to be answerable to *Bivens* suits. The Second Circuit's incongruent treatment of CSC as compared to the BOP and the FDIC, thus, is both illogical and inequitable and, therefore, should be rejected. Just as importantly, upholding this incongruent treatment of private entities, as compared to their counterpart public entities, would interfere with express congressional policies regarding privatization. Accordingly, this Court should refuse to extend *Bivens* to private entities.

1. CSC And The BOP Serve The Same Basic Function: Confinement Of Inmates.

Respondent's theory of liability rests on the basic principle that CSC performs the same public function as does the BOP. Cf. *Kauffman*, 28 F.3d at 1226. That is, Respondent seeks to make CSC amenable to *Bivens* suit on the ground that CSC is acting sufficiently like the Federal Government to be acting under color of federal law. Indeed, the duties that he alleges that CSC employees violated are duties that Congress has committed to the BOP: namely, to provide "for the safe-keeping, care, and subsistence of all persons charged with or

convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2); see also *id.* § 4006 (discussing subsistence for prisoners, including health care items and services).

As an entity engaged in the precise activities as the BOP, albeit with contractual limitations and BOP oversight, CSC should be subject to the same exposure to *Bivens* liability as is the BOP. Under the decision below, however, private correctional providers, such as CSC, may be liable under *Bivens*, while the BOP—the entity with ultimate statutory responsibility for prison inmates—is free from such liability. See, *e.g.*, *Howard* v. *Federal Bureau of Prisons*, 198 F.3d 236, No. 99-6708, 1999 WL 798883, at **1 (4th Cir. Oct. 7, 1999) (per curiam) (unpublished table decision) (concluding that *Bivens* action could not be brought against the BOP); *Tejeda* v. *Reno*, No. 00-CIV-6338 SAS, 2000 WL 1280969, at *3 (S.D.N.Y. Sept. 11, 2000) (same); *Newman* v. *Holder*, 101 F. Supp. 2d 103, 107 (E.D.N.Y. 2000) (same).

Indeed, "the differences between a federal agency and an artificial person that is a federal actor seem to weaken, rather than strengthen, the case for a *Bivens* remedy." *Kauffman*, 28 F.3d at 1226. Under *Meyer*, if the private entity-defendant actually *were* a federal agency, a *Bivens* action would only lie against its individual employees, not against the entity itself. "That the [private entity]'s link to federal authority is more tenuous does not make a *Bivens* remedy against it any more appropriate." *Id.*[20] This Court should reverse the decision

[20] The prospect of extending *Bivens* to any private party itself counsels hesitation. *See generally Zerilli* v. *Evening News Ass'n*, 628 F.2d 217, 224 (D.C. Cir. 1980) (stating that the fact that a claim is against a private party "should at least 'counsel hesitation' in the creation of *Bivens* liability"); *Fletcher* v. *Rhode Island Hosp. Trust Nat'l Bank*, 496 F.2d 927, 932 n.8 (1st Cir. 1974) ("[T]here is no [*Bivens*] cause of action against private parties acting under color of federal law or custom."). The core, paradigm *Bivens* claim is one against an *individual federal officer*. *See FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994); *Carlson* v. *Green*, 446 U.S. 14, 21 (1980); *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971). Indeed, the Court has *never*

below, which causes this illogical and inequitable difference in treatment between the BOP and private correctional providers.[21]

2. CSC Shares Critical Attributes With The FDIC And Other Government Corporations.

It is likewise illogical and inequitable to treat CSC and the FDIC differently in terms of their amenability to *Bivens* liability. In fact, private contractors, such as CSC, are strikingly similar to federal government corporations, such as the FDIC, in several critical ways. First, both private contractors and federal government corporations have legal personalities separate from the Federal Government. See A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 552 (defining federal government corporations as "separate legal persons chartered directly by an act of Congress or by persons acting pursuant to congressional authorization"); Buel White et al., *Budget Limitations Spur Privatizations*, Nat'l L. J., May 27, 1996, at B7 ("Government corporations typically are structured as stand-alone corporate bodies.").[22] Second, as with CSC, it is

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recognized a *Bivens* remedy against *anyone* other than an individual federal officer. As a claim extends from that core, *e.g.*, to private entities, a court should be more reluctant to expand *Bivens* liability. *See, supra*, Section I.A; *cf. Kauffman*, 28 F.3d at 1226.

[21] A different issue of equity is raised by the possibility that otherwise similarly situated federal prisoners currently may have different remedies for similar mistreatment depending solely on the kinds of facility (federal, state, municipal, or private) to which the Federal Government chooses to commit them. *Cf. McCall* v. *Swain*, 510 F.2d 167, 182 (D.C. Cir. 1975) (asserting that disparate access to courts for prisoners based solely on the Attorney General's commitment orders "would likely constitute a denial of equal protection").

[22] Indeed, "the United States is not legally responsible for the debts of even a wholly owned [federal government corporation] unless there is a constitutional, statutory, or federal common-law rule to the contrary." A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 553.

not necessary for the Federal Government to own all, or even any, of the FDIC's equity.[23] Like CSC, the FDIC gets a portion of its funding from nonfederal sources and, in some years, its nonfederal collections exceed its gross outlays. United States GAO, *Government Corporations: A Profile of Existing Government Corporations* 69 (Dec. 1995). Thus, much of the money in the FDIC's coffers at any given time does not come from the federal budget, but from assessments from insured banks. Third, like private corporations (including CSC), the FDIC can "sue and be sued." 12 U.S.C. § 1819(a). As *Meyer* noted, the FDIC's "sue-and-be-sued clause 'fully waived'" sovereign immunity. 510 U.S. at 483 (quoting *Franchise Tax Bd.* v. *Postal Serv.*, 467 U.S. 512, 520 (1984)). *Meyer* gave government corporations, such as the FDIC, the same exemption from *Bivens* liability granted to government agencies. A private corporation, such as CSC, which is fulfilling a public mission on behalf of the Federal Government and shares key characteristics relevant to both suability and accountability, should receive the same treatment under *Meyer* as does the FDIC.[24]

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[23] As a mixed-ownership corporation, *see* 31 U.S.C. § 9101(2); United States GAO, *Government Corporations: A Profile of Existing Government Corporations* 68 (Dec. 1995), "the United States may own some or none of the [FDIC's] equity." Froomkin, *supra*, at 555. As originally constituted, the FDIC was owned in part by the banks that it insured and is now funded by assessments from insured banks. *See* Banking Act of 1933, ch. 89, sec. 8, § 12A, 48 Stat. 162, 168-72 (creating FDIC and describing stock ownership); *see also* Federal Deposit Insurance Act, ch. 967, sec. 2, § 7, 64 Stat. 873, 876-79 (1950) (recodifying Federal Deposit Insurance Act and instituting assessment system).

[24] In fact, at least one commentator argues that government corporations are subject to *less* accountability than are *either* government agencies *or* private corporations:

> [A]n FGC's [federal government corporation] liberty to abuse its powers faces fewer practical or even theoretical constraints than comparable institutions. Because FGCs are federal, they are not subject to regulation by the states. Because they are governmental, and often have special powers or access to cheaper capital, they are

3. Extending *Bivens* Liability To Private Entities Would Interfere With Congressional Policy Regarding Privatization.

A judicial authorization of *Bivens* actions against private entities would undermine Congress's stated policy in favor of privatization. That consideration also counsels hesitation in extending *Bivens* to this context.

Indeed, Congress has enacted many statutory provisions permitting[25] and encouraging[26] federal agencies to work with

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largely immune from market forces. Because they are corporations, they are exempt from most constraints ordinarily applied to federal agencies. . . .

. . . Ordinary state-chartered corporations exist to further privately selected goals, often the quest for private profit. Their liberty to abuse their powers is curbed by market forces and by public and private laws enacted by both the state and federal governments. Ordinary federal agencies are established to further publicly selected goals, defined, in at least a general fashion, by Congress and the President. The federal agencies' liberty to abuse their powers is curbed by political forces, federal statutes, and the Constitution. In practice, neither public nor private accountability mechanisms are necessarily effective when applied to many FGCs.

Froomkin, *supra*, at 560 (footnote omitted).

[25] *See, e.g.*, 8 U.S.C. § 1522(b)(1)(A)(ii) (permitting Director of Immigration and Naturalization Service to contract with "public or private nonprofit agencies" for initial resettlement of refugees); 10 U.S.C. § 2462(a) (permitting Secretary of Defense to use private contractors for Department of Defense functions "other than functions which the Secretary of Defense determines must be performed by military or Government personnel"); 12 U.S.C. § 1701w (permitting Secretary of Housing and Urban Development to contract with public or private organizations to counsel mortgagors insured under certain code provisions); *id.* § 4241(a) (permitting Attorney General to contract with private attorneys to represent United States in civil actions against persons who committed bank fraud); 20 U.S.C. § 2534(a) (permitting Secretary of Education "on a competitive basis, to enter into contracts" with, *inter alia*, private nonprofit organizations to train teachers and counselors); *id.* § 3475 (permitting Secretary of Education to contract with, *inter alia*, "private organizations and persons . . . as the Secretary may determine

or through private entities. See also, *supra*, n.1 (listing congressional authority for private correctional providers). In pursuing privatization, Congress has sought to promote a number of goals, including reducing costs while maintaining or improving quality of services.[27] Other goals furthered by

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necessary or appropriate to carry out functions of the Secretary or the Department"); 24 U.S.C. § 324(a) (permitting Secretary of Health and Human Services ("HHS") to contract with private hospitals for care of certain mentally ill persons); 25 U.S.C. § 452 (permitting Secretary of the Interior to contract with private entities to provide for the education, medical attention, agricultural assistance, and social welfare of Indians); 30 U.S.C. § 937(a) (permitting Secretary of HHS to contract with "public and private agencies and organizations and individuals for the construction, purchase, and operation" of clinics for the diagnosis and treatment of respiratory and pulmonary illness of coal miners); 42 U.S.C. § 604a(a)(1)(A) (permitting States funded through certain Social Security provisions to contract with charitable, religious, or private organizations to perform the funded functions); *id.* § 5150 (permitting contracting with "private organizations, firms, or individuals" to perform disaster and emergency assistance activities and encouraging use of "organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency"); *id.* § 5631(b)(1) (permitting Administrator to contract "with public and private agencies, organizations, and individuals to provide technical assistance" to states, localities, and agencies in performing programs to prevent juvenile delinquency and to improve juvenile justice); *id.* § 11705(a) (permitting Secretary of HHS to enter into contracts with entities to provide health care to native Hawaiians).

[26] *See, e.g.*, 16 U.S.C. § 5959(a)(1) ("To the maximum extent practicable, the Secretary [of the Interior] shall contract with private entities to conduct or assist in those elements of the management of the National Park Service concessions program considered by the Secretary to be suitable for non-Federal performance."); 22 U.S.C. § 2381(a) (requiring agencies and officers, "to the fullest extent practicable," to contract with private enterprises to perform functions under the Foreign Assistance chapter of Title 22).

[27] *See, e.g.*, 139 Cong. Rec. E2554-01, E2554 (daily ed. Oct. 27, 1993), *available at* 1993 WL 435032 (statement of Rep. Crane) (quoting Asmus, *Private Sector Solutions to Public Sector Problems*, Imprimis (Oct. 1993)); 132 Cong. Rec. S3552-02 (daily ed. Mar. 26, 1986) (statement of

privatization include "promoting local job creation and private sector investment in rural communities," 7 U.S.C. § 2204d(a); promoting the interests of small-business concerns, 15 U.S.C. § 631(a); encouraging private investment in "less developed friendly countries," 22 U.S.C. § 2351(a); serving the best interests of patients, 24 U.S.C. § 324(a); promoting firms "owned and controlled by socially and economically disadvantaged individuals," 31 U.S.C. § 3718(b)(1)(B); and promoting competition, H.R. Rep. No. 106-1047 (2001), *available at* 2001 WL 29442 (discussing Pub. L. No. 106-180).

Creating a *Bivens* action against private entities performing government functions, but not against their government counterparts, undermines Congress's efforts to achieve these goals through privatization. As previously noted, by imposing increased costs on private entities, extending *Bivens* liability will cause private entities either to raise their prices or to avoid contracting with the government. See *Boyle*, 487 U.S. at 507; Section II.A. In addition to imposing costs on the federal fisc, this effect risks causing privatization to become unavailable in many instances due to lack of availability of government contractors because of the increased liability risks. Thus, in addition to being inequitable, the disparate treatment proposed by Respondent distorts privatization that would otherwise occur. This, in turn, may prevent many congressional policies from being achieved. Because extending *Bivens* in this context would amount to "harmful and inappropriate judicial intrusion," *Stanley*, 483 U.S. at 681, in

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Sen. Humphrey); 132 Cong. Rec. E403-01 (daily ed. Feb. 20, 1986) (statement of Rep. Courter). *See also* S. Rep. No. 106-77 (1999), *available at* 1999 WL 398160 (discussing privatization of NASA functions to increase cost-effectiveness); H.R. Conf. Rep. No. 106-355 (1999), *available at* 1999 WL 782348, at *119-*20 (discussing possible privatization of air traffic management). In fact, statutory provisions expressly require the Department of Defense to contract with the entity (private or public) which will perform a given function at the lowest cost. *See* 10 U.S.C. § 129a; *id.* § 2462(a).

privatization policy best left to Congress, Respondent's requested extension should be rejected.

Extending *Bivens* liability to private entities raises special concerns by creating different rules for public and private entities performing the same functions and playing similar roles in relation to the Federal Government. Such differential treatment would be illogical, inequitable, and contrary to congressional policy regarding privatization. There would be a special concern about incongruent treatment in any context—but particularly where, as here, a congressional purpose of encouraging privatization is evident. These concerns, whether taken together or separately, counsel this Court not just to hesitate, but to decline altogether to extend *Bivens* liability in this context.

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The special factors highlighted herein illustrate the thicket of policy issues in which the courts would inevitably become enmeshed in deciding whether *Bivens* liability should be extended to private entities as defendants.[28] Applying *Bivens* liability to private correctional providers, particularly given that the BOP and FDIC are not subject to suit under *Bivens*, would interfere with both federal fiscal policy and congressional privatization policy. In light of all of these special factors counseling judicial reluctance and deference to a legislative solution, this Court should reject the court of appeals' holding extending *Bivens* liability to private entities.

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[28] Extending *Bivens* here would also raise a host of thorny legal questions. For example, the proposed extension of *Bivens* would require courts to decide whether—and how—to extend *Bivens* to states and municipalities that contract with the Federal Government. *Compare Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) (refusing to apply *Bivens* to state actors), *with Haynesworth* v. *Miller*, 820 F.2d 1245, 1274 & n.241 (D.C. Cir. 1987) (extending *Bivens* to municipalities but importing Section 1983 limits, *e.g.*, rejection of *respondeat superior* liability and immunity from punitive damages on liability).

III. SECTION 1983 IS IRRELEVANT TO THE QUESTION OF WHETHER TO CREATE A NEW *BIVENS*-TYPE ACTION.

In applying *Bivens*, the Court has both the duty and the opportunity to consider whether a given extension serves the purposes of the *Bivens* remedy and whether special factors weigh against doing so. This role contrasts sharply with the Court's role in applying the cause of action created by Congress in 42 U.S.C. § 1983.[29] As shown above, *Bivens* is a narrow, judge-made gap filler with a specific goal of deterring individual officers from violating the Constitution. By contrast, Section 1983 is part of a broad and inclusive congressional remedial scheme providing an all-purpose vehicle for "monetary, declaratory, or injunctive relief," *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 690 (1978), against "[e]very person" violating constitutional rights under color of state law, 42 U.S.C. § 1983.

Consistent with its expansive remedial scope, Section 1983 has a "textual" basis and a broader sweep than does *Bivens*. Section 1983 permits plaintiffs to bring a cause of action against "*[e]very person*" who deprives them of constitutional rights under color of state law, which includes more than natural persons. 42 U.S.C. § 1983 (emphasis added); *Monell*, 436 U.S. at 683. Indeed, "[a]n examination of the debate on [Section 1983] and the application of appropriate rules of construction show unequivocally that [Section 1983] was intended to cover legal as well as natural persons." *Monell*,

[29] The Second Circuit below asserted, without analysis, that there is "no reason not to incorporate [Section 1983] law into the *Bivens* context and permit suits against private corporations engaging in federal action," Pet. App. 12a (citing *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)); *see also Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 708 (6th Cir. 1998) (finding "no valid reason" not to apply Section 1983 jurisprudence to extend *Bivens* to private corporations). This assumption ignores both binding precedent and the many reasons why Section 1983 is of no use in resolving the threshold question of whether to extend a *Bivens* action to private entities.

436 U.S. at 683. Thus, Section 1983, with its broad definition of "person" and broad remedial mission, necessarily reaches private parties, both individuals and entities, if sufficient state action is shown. See *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 942 (1982).

The breadth of Section 1983 is no accident, for Congress designed Section 1983 to remedy a broad problem:

> The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. The debates on the Act chronicle the alarming insecurity of life, liberty, and property in the Southern States, and the refuge that local authorities extended to the authors of these outrageous incidents . . . .

Wilson v. *Garcia*, 471 U.S. 261, 276 (1985) (citation omitted). As such, a central purpose of Section 1983 has always been to address the acts of *all* private parties acting under color of state law.

By contrast, *Bivens* was designed to solve a narrow problem and to reach a narrow class of defendants. See Section I. "[T]he logic of *Bivens*" supports a very narrow cause of action: "to deter *the officer*" through the direct threat of litigation and liability for damages against that officer. *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). In addition, and in part because it is a judge-made cause of action, courts must consider whether special factors exist that make it more appropriate to look to Congress to create a remedy. See *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983); *Butz* v. *Economou*, 438 U.S. 478, 503 (1978).

It is both unsurprising and appropriate that the Court crafted a narrower remedy in *Bivens* than did Congress in Section 1983. Unlike Congress, the courts cannot hold hearings and determine whether a broader remedy is appropriate. See *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983)

("Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of [individuals], but it also may inform itself through factfinding procedures such as hearings that are not available to the courts."). Instead, courts rightly proceed cautiously.

Recognizing the critical distinctions between the institutions that created these two remedies, this Court has made clear that, while Section 1983 caselaw may be helpful in evaluating how to *apply* immunities to an established *Bivens* remedy, Section 1983 is not relevant to the question of whether to *create* a *Bivens*-type remedy. See *Butz*, 438 U.S. at 503 (juxtaposing the threshold analysis of whether a cause of action exists under *Bivens* from the decision of whether to apply an immunity recognized in the Section 1983 context to an established *Bivens* action); cf. *United States* v. *Stanley*, 483 U.S. 669, 684 (1987) ("[W]hether a damages action for injury . . . can be founded directly upon the Constitution—is analytically distinct from the question of official immunity from *Bivens* liability."). Indeed, Section 1983 could not be relevant to this threshold inquiry: Whether a given application would deter constitutional violations or whether "special factors counsel hesitation" is irrelevant under Section 1983, but courts will not extend the *Bivens* remedy without undertaking precisely that two-step analysis. In this case, that analysis compels the conclusion that extension is inappropriate.

* * * * *

Far from serving the core *Bivens* purpose of deterring individual officers—the persons targeted by the *Bivens* action and the ones actually in contact with the public—from engaging in constitutional torts, implying a remedy against an entity would actually undermine that purpose. See *Meyer*, 510 U.S. at 485. That fact, which itself compels the conclusion that extending *Bivens* is not appropriate, is buttressed by the utter lack of any reason to believe that Respondent, and similarly situated plaintiffs, lack an adequate remedy for

constitutional torts committed by employees of private entities. But even if the proffered extension "were consistent with *Bivens*," it would be unwise to expand *Bivens* to this context in light of the "'special factors counselling hesitation.'" *Id.* at 486 (quoting *Bivens*, 403 U.S. at 396). Because Respondent cannot establish either component deemed essential to support a judge-made expansion of *Bivens*, the Court should decline his request to extend *Bivens* to private entities.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

GEORGE P. STASIUK
GEORGE F. BRENLLA
CLIFTON BUDD & DEMARIA, LLP
420 Lexington Avenue
New York, NY 10170
(212) 687-7410

KAREN M. MORINELLI
CORRECTIONAL SERVICES CORP.
1819 Main Street
Sarasota, FL 34236
(941) 953-9199

CARTER G. PHILLIPS*
FRANK R. VOLPE
JENNIFER M. RUBIN
REBECCA K. SMITH
SIDLEY AUSTIN BROWN & WOOD
1722 Eye Street, NW
Washington, DC 20006
(202) 736-8000

Counsel for Petitioner

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* Counsel of Record